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No. 96-601

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RISSLER & MCMURRY CO,
a Wyoming corporation,

Petitioner,

v.

THE STATE OF WYOMING,

Respondent.

On Petition For Writ Of Certiorari
To The Wyoming Supreme Court

PETITIONER'S REPLY BRIEF

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SUMMARY OF REPLY ARGUMENT

1. The Response Brief filed by the State of Wyoming asserts that the Petitioner's complaint challenges the State's Administrative Rule as invalid **as applied** to it and therefore falls outside the mandate of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 and *Yee v. City of*

Escondido, 503 U.S. 519 (1992) which renders a takings claim ripe upon enactment of a **facially** invalid rule. To the contrary, Petitioner's complaint alleges a **facially invalid** rule claim and a forum has been erroneously denied to decide the legal sufficiency of this claim in the state courts upon ripeness grounds under *Lucas* and *Yee*. Further, the assertion by the State of Wyoming that Petitioner failed to assert the facially invalid rule in the trial court under *Yee* and *Lucas* on appeal is erroneous. It was pled in the complaint and the courts of the State of Wyoming refused to address the issue or provide a forum to determine the merits of the claim.

2. The state court's reliance upon *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172; *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.,* 452 U.S. 264 (1981); and *Presbytery of Seattle v. King County,* 787 P.2d 907 (Wash. 1990) Cert. denied 498 U.S. 911, and rejecting *Lucas* and *Yee,* supra, at the Rule 12(b)(6) procedural posture is misplaced.

REPLY ARGUMENTS

I.

The response brief of the State of Wyoming takes the position that the allegations of Petitioner's complaint relating to the invalid rule making by its administrative agency should be read as an "as applied" challenge so as to avoid the ripeness mandate of *Lucas* and *Yee*. Such interpretation is erroneous. The complaint alleges the invalid Administrative Rule in the context of an enactment of a facially invalid rule in violation of the state agencies' statutory mandates and definitions. As such, the complaint alleges a prima facie facially invalid rule challenge under *Lucas* and *Yee* which

clearly vests standing and ripeness to a takings claim upon the date of enactment of the alleged facially invalid rule.[1]

At the Rule 12(b)(6) level, a constitutionally based complaint is not to be dismissed unless it appears beyond doubt that Petitioner can prove no set of facts to sustain the claim. *Haines v. Kerner*, 404 U.S. 519 (1972). Here, because of the Rule 12(b)(6) dismissal by the state courts of Wyoming, a forum has been denied to determine the factual and legal basis of this invalid rule claim. The invalidity of the rule has been pled under *Lucas* and *Yee* and that is all that is required to vest standing at this procedural point. Until a forum is provided and the fact specific merits of this claim are developed, the validity and legal sufficiency of this aspect of Petitioner's claim has not been determined. The injury in fact is alleged and *Lucas* and *Yee* require nothing more at the pleading stage under Rule 12.

The state courts refusal to consider the facially invalid rule issue cannot be placed at the feet of the Petitioner here. The Petitioner's claim was pled and briefed in the trial court and the Supreme Court. Both courts ducked the issue to avoid this Court's clear rulings in *Lucas* and *Yee* concerning ripeness in the context of alleged facially invalid rule takings claims. The Petitioner pled and briefed its cause and *Lucas* and *Yee* require nothing more at the pleading stage. Hence this Writ is filed to obtain a forum in the state courts of Wyoming to determine the merits of Petitioners constitutionally based takings claim.

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[1]The Wyoming Supreme Court has consistently condemned the type of invalid Administrative Rule making as seen in this case. *See Kerr-McGee Corporation v. Wyoming Oil & Gas Conservation Commission*, 903 P.2d 537 (Wyo. 1995). However, in the instant case, the state courts refused to address that issue knowing full well the ripeness ramifications of *Lucas* and *Yee* should they do so.

II.

The State of Wyoming's reliance upon *Williamson*, supra; *Hodel*, supra and *Presbytery of Seattle*, supra as controlling over *Lucas* and *Yee* is misplaced. This case is pled under *Lucas*, *Yee* and *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). Those cases control the ripeness issues upon which this Writ to review the Rule 12(b)(6) dismissals by the state courts turn. After *Lucas*, the Washington courts have reconsidered *Presbytery of Seattle* and severely limited that decision. *Powers v. Skagit County*, 835 P.2d 230 (Wash. 1992).

This case was pled and is controlled by *Lucas* and *Yee* on the issues of ripeness, standing and exhaustion of administrative remedies at the pleading stage. Again a forum has been denied to determine the merits and legal efficacy of these issues of law and fact to which the principles of takings law as developed by this court can be applied, upon an uncompromised record, and after which appropriate appellate review can follow.

CONCLUSION

A vast majority of the lands in the State of Wyoming are owned by governmental entities. To deny a forum to hear a constitutionally based takings claim in the state courts based upon an absolute adherence to the Administrative Exhaustion Rule renders the precedents of *Lucas* and *Yee* meaningless in Wyoming.

This Writ should be granted and the cause summarily remanded to the state courts of Wyoming to provide a forum for the determination of the merits of these claims.

Respectfully submitted,

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